European Fund and Asset Management Association

Brussels, 04 March 2019

Public consultation on the functioning of the administrative cooperation in the field of direct taxation

I. Introduction

EFAMA[1] is a strong supporter of the Commission's agenda to enhance tax transparency within the EU with the aim to tackle tax abuse and resulting distortions in the internal market. European investment funds are subject to stringent EU and local regulations covering governance, organisational and operational arrangements, investment guidelines, transparency and investor protection. Last December EFAMA sent a letter to the European Commission and to the tax administrations of all 28 countries adopting DAC6 in parallel. Our letter is attached under Section F of this consultation document.

The letter sets out the views of the European investment management industry with regard to the implementation of Council Directive (EU) 2018/822 of 25 May 2018 ("DAC6"), including general comments on the Directive, on its background and on the Commission's agenda to enhance tax transparency within the EU.

It equally features EFAMA's concerns with respect to some of the hallmarks introduced as Annex IV of DAC6. Considering the wide scope and broad wording of DAC 6, the letter includes requests for clarifications and provisions aiming at avoiding unnecessary administrative burdens and providing for more legal certainty.

EFAMA understands that the European Commission can play a valuable role in helping tax authorities coordinate their approach in the implementation of DAC, with a view to consistency of outcome.

Therefore, EFAMA now takes this opportunity to:

a) Reply to the questionnaire on the Overall assessment of the Directive (Section A));
b) Provide the European Commission with more detailed comments that further develop EFAMA's position (Section F)). These comments should be read alongside the EFAMA letter referred above.

[1] EFAMA is the voice of the European investment management industry. It represents through its 28 member associations and 62 corporate members more than EUR 16 trillion of investment fund assets at end Q3 2018. These assets were managed by almost 61,600 investment funds, of which close to 33,000 were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining funds composed of AIFs (Alternative Investment Funds). Including discretionary mandates, third-party regulated asset managers managed EUR 25 trillion in Europe at end 2017.

II. Reply to the questionnaire

A) Overall assessment of the directive

To what extent do you believe the following goals of administrative cooperation are important for Europe and globally?	**Very important**	**Important**	**Moderately important**	**Marginally important**	**Not important at all**	**Don't know**
Increase EU Member States' ability to ensure that all taxpayers pay their taxes, irrespective of the place where the incomes are received or assets are held		X				
Reduce incentives for Member States to offer particularly favourable tax conditions not available to other taxpayers, thus competing for tax revenues with other Member States		X				
Increase transparency in the tax planning of companies active in several EU Member States		X				

To what extent do you consider the tools given for tax authorities in the Directive appropriate to meet the goals?	**To a very large extent**	**To a large extent**	**To some extent**	**To a limited extent**	**To a very limited extent**	**Don't know**
Increase EU Member States' ability to ensure that all taxpayers pay their taxes, irrespective of the place where the incomes are received or assets are held		X				
Reduce incentives for Member States to offer particularly favourable tax conditions not available to other taxpayers, thus competing for tax revenues with other Member States		X				
Increase transparency in the tax planning of companies active in several EU Member States			X			

Concerning the effects of the Directive, to what extent would you agree with the following statements?	**Agree**	**Partly agree**	**Neutral**	**Partly disagree**	**Disagree**	**Don't know**
Increase EU Member States' ability to ensure that all taxpayers pay their taxes, irrespective of the place where the incomes are received or assets are held		X				
Reduce incentives for Member States to offer particularly favourable tax conditions not available to other taxpayers, thus competing for tax revenues with other Member States		X				
Increase transparency in the tax planning of companies active in several EU Member States			X			

In your opinion, would the same results have been achieved even without the Directive (i.e. by means of international initiatives or national interventions)?	
(only one answer please)	
Yes, the same results would have been achieved without the Directive	
Most of the same results would have been achieved without the Directive	
Some of the results would have been achieved without the Directive, but the Directive was useful and/or instrumental to most of them	X
No, the Directive was essential to achieve these results	
Don't know	

Please explain how the same results could have been achieved, and/or how the Directive was useful to achieve them.
Member States could use the work of the OECD on the Common Reporting Standard, and also more specifically its Model Mandatory Disclosure Rules.

In your experience, do you see any aspects in which the Directive is not in line with other laws or initiatives?	
(only one answer please)	
Yes	x
No	
Don't know	

If you replied yes to the previous question, could you please explain?
EFAMA supports the European Commission's regulatory fitness and performance (REFIT) programme which aims to ensure that EU legislation delivers results for citizens and businesses effectively, efficiently and at minimum cost. According to the 2018 Annual Burden Survey *"[t]he Commission is pursuing its simplification efforts by continuing the evaluation of a number of policy areas to assess the fitness for purpose of the existing legislation. It is also assessing opportunities for simplifying the existing framework or decreasing regulatory costs that can be identified.* ***This includes evaluations in the area of: (…) administrative cooperation in the field of direct taxation****."* However, with regards to DAC 6, EFAMA is of the opinion that *"**care needs to be taken in the implementation of the directive at a national level to avoid** multiple reporting (or even over-reporting) that would trigger **unnecessary compliance costs** for investment fund structures. Tax authorities [would] receive a "tsunami" of information and there is a big risk that the most import information [would] drown"* - please refer to our letter (attached under Section F of this consultation document).

To ensure consistency within the whole DAC framework, Member States could use the clarifications, definitions and exemptions of the MDR as a source of illustration and interpretation, not only for those parts of the Directive addressing CRS avoidance arrangements, but for the whole Directive.

EFAMA understands that **public clarification / guidance is needed on the interpretation of several concepts that embody the wide scope of DAC6** – Please refer to our comments below, under section F of this consultation document.

If you wish to add other comments or remarks on the overall assessment of the Directive, please feel free to do so here.
1000 character(s) maximum
EFAMA agrees with the conclusions that emerge from EC's Report "on overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation" – COM(2018)844 final, from 17-12-2018. The quality of information exchanged must be improved and Member States should ensure that they make a better use of the data received. It is not effective to collect information if no use would be made of such information by tax authorities in the Member States. Mass reporting should be avoided and tax authorities should focus on aggressive and harmful tax planning.

F) Document upload and final comments

If you wish to add further information within the scope of this questionnaire, please feel free to do so here. Please feel free to upload a concise document, such as a position paper. The maximum file size is 1MB.Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this public consultation. The document is optional and serves as additional background reading to better understand your position.

DAC 6 forms part of the Directive and of measures aiming at preventing tax avoidance through exchange of information. However, although it is based on the same principle of mandatory automatic exchange of information as the previous amendments brought to the Directive by DAC 2, DAC 3 and DAC 4, DAC 6 uses a different way to DAC 2 which provides for mandatory automatic exchange of information on financial accounts precisely defines the applicable rules and the specific information on financial accounts and types of income that should be exchanged. In addition, at the time of its implementation, DAC 2 highly relied on the extensive preparatory work and further various guidelines issued by the OECD as well as on the experience gained by financial institutions upon the implementation of the Foreign Account Tax Compliance Act and this has allowed for a consistent implementation across the EU and worldwide. Despite all that, the implementation of DAC 2 has been a cost and time consuming exercise for financial institutions and tax authorities.

In DAC 6, the definitions of applicable concepts and hallmarks are purposefully broadly worded and thus allow significant room for interpretation. Also, the possible reliance on the OECD BEPS report on Action 12 and the work on Model Mandatory Disclosure Rules is more limited as, for example, outlined in Recital 13 of DAC 6"[…] *In implementing the parts of this Directive addressing CRS avoidance arrangements and arrangements involving legal persons or legal arrangements or any other similar structures, Member States could use the work of the OECD, and more specifically its Model Mandatory Disclosure Rules"*.

DAC 6 therefore appears as a separate category of mandatory exchange of information where, amongst others, taxes covered, arrangements covered, definitions of hallmarks and reference frameworks have been left to the national authorities to define. Although we understand that this has been done on purpose in order to ensure the best possible adaptation of DAC 6 to the various national situations and realities of each EU MS, the absence of further guidelines at EU level entails a clear risk of a lack of convergence on areas where this would have been possible or even a key element.
As the representative of the European investment fund industry, EFAMA believes that the following concepts included in DAC 6 should be further detailed and/or clarified as the application of those concepts to the investment fund industry could prove to be a challenging exercise.

1. The notion of intermediary

The notion of "intermediary" of article 3, point 21 of Directive 2011/16/EU is broadly defined as *"any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement."* The definition is completed with *"[…] It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all relevant facts and circumstances as well as available information and their relevant expertise and understanding".*

The definition seems to provide for (at least) two categories of intermediaries. Those who design, market, organize or make available for implementation or manage the implementation, may be regarded as the "main intermediaries" or "promoters". Those who provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, and implementing an arrangement may be regarded as "ancillary intermediaries" or "service providers".

A typical investment fund structure would encompass a wide range of service providers that would fulfil various functions (depending on the type of fund, investors in and/or investment of the fund). These service providers could qualify respectively as main intermediaries or as ancillary intermediaries within the meaning of the Directive. Some clarifications would therefore be needed as to (i) how it should be determined under which (part of the) definition an intermediary should fall and (ii) where an intermediary may qualify under both definitions, how such situations should be dealt with. This qualification is relevant in practice as the timing for the reporting is different in each case.

2. The knowledge presumption

"[H]aving regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services [an ancillary intermediary/service provider] knows or could be reasonably expected to know" that it would be dealing with a reportable cross-border arrangement.

As mentioned in our letter (attached under Section F of this consultation document), investment funds, management companies and professionals of the financial sector are subject to the KYC rule and to the AML Directive and are gathering information to fulfil their respective duties under such specific rules.

We assume however, in the context of DAC 6, that although these rules may be considered as a source of knowledge, they will not necessarily (or systematically) be considered as being sufficient to provide the relevant service providers with the requisite knowledge to determine if a reporting must be made under DAC 6. It would thus be important to confirm that the fact of being subject to the AML law is not an absolute presumption of having the required knowledge under DAC 6 and thus ultimately be considered as an intermediary.

We also note that in a fund structure where several service providers are providing services, all could potentially be in a position to qualify as intermediaries and bound by a reporting obligation. Based on their respective specific knowledge of an arrangement and their assessment of the hallmarks, they may not necessarily reach the same conclusions.

It would therefore be useful if the EC, aligned with the Members States, could:

i) Provide guidance on situations in which a service provider would be “reasonably expected to know” that it deals with a reportable arrangement (notably depending on the types of services rendered in practice);
ii) Expressly specify how the reporting obligations should be managed between the various intermediaries involved in the same arrangement as outlined hereunder;
iii) As mentioned in our letter (attached under Section F of this consultation document), confirm that, in any case, no additional due diligence requirements than the ones performed under KYC rule and AML Directive are imposed on a service provider when assessing if an arrangement has to be reported and, in particular, for ancillary intermediaries.

3. Proof of reporting

Another element which raises some concerns is outlined in point 9 of the new article 8ab: “Each Member State shall take the necessary measures to require that, where there is more than one intermediary, the obligation to file information on the reportable cross-border arrangement lie with all intermediaries involved in the same reportable cross-border arrangement. An intermediary shall be exempt from filing the information only to the extent that it has proof, in accordance with national law, that the same information referred to in paragraph 14 has already been filed by another intermediary.”

Clarifications would be welcome in particular with regards as to (i) how the intermediary that has performed the reporting could inform the other relevant intermediaries in compliance with any applicable confidentiality rule; (ii) whether the proof of reporting should be submitted proactively and in this case, when, how and to whom it should be submitted, or whether it may be provided only upon request of the tax authorities. Also, in order to avoid discussions amongst intermediaries about who should report, which may open the door to multiple or over-reporting (e.g. in case several intermediaries would report the same arrangement or in case a first intermediary knows that a second intermediary has reported, but would still decide to also report in order to avoid any liability), it would be useful to provide some guidance on a potential hierarchy or order of priority to apply to intermediaries, or on any other provisions allowing the effective management of their obligations.

Also, with regards to the question of the proof of reporting as referred to under points 4, 8 and 9 or article 8ab, it would be useful if Member States could encourage a harmonised approach in the EU.

4. "Relevant Taxpayer" in the investment fund industry

A "Relevant Taxpayer" is defined by the Directive as *"any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement."*
As DAC 6 does not include a specific definition of the term "person", we understand that reference should be made to Directive 2011/16/EU on administrative cooperation in the field of taxation in its article 3, paragraph 11. This article defines "person" as a natural person, a legal person, an association of persons recognised as having the capacity to perform legal acts but lacking the status of a legal person or any other legal arrangement of whatever nature and form, regardless of whether it has legal personality, owning or managing assets, which, including income derived therefrom, are subject to any of the taxes covered by Directive 2011/16/EU.

It would be important for the investment fund industry to obtain clarification as to whether and to which extent investment funds or tax transparent fund vehicles may be considered as relevant taxpayers under the Directive. Should they not be considered as relevant taxpayers, it would then be important to clarify under which other category (i.e. intermediaries, participants or even arrangements) investment funds may fall. The same questions exist with respect to the application of the various hallmarks and the main benefit test to transactions involving an investment fund.

5. Entities located outside the EU

The concept of relevant taxpayer in the context of the investment fund industry would also have to be further clarified in case the management company/ a manager or an AIF is located outside of the EU. Determining who the taxpayer would be important in practice given the fact that the reporting obligations may be shifted to it in certain situations, for example, when the intermediary is protected by the legal professional privilege or when it is located outside the EU. We believe that only the management company, the manager and / or the AIF could be considered as a relevant taxpayer implementing the fund structure (with the assistance of the external service providers as the case may be).

In certain cases, the Directive might apply to a relevant taxpayer which is not tax resident or located in the EU. Article 8ab paragraph 7 of the Directive identifies that: "Where the relevant taxpayer has an obligation to file information on the reportable cross-border arrangement with the competent authorities of more than one Member State, such information shall be filed only with the competent authorities of the Member State that features first in the list below:

(a) the Member State where the relevant taxpayer is resident for tax purposes;
(b) the Member State where the relevant taxpayer has a permanent establishment benefiting from the arrangement;
(c) the Member State where the relevant taxpayer receives income or generates profits, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State;
(d) the Member State where the relevant taxpayer carries on an activity, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State".

Assuming that both the management company and the AIF are located outside the EU, it is unclear whether the management company or the AIF will nevertheless be considered as a relevant taxpayer in case they derive income from another EU Member State or if the underlying investments are located in the EU. If so, they might have to comply with the reporting obligations. This reading could nevertheless be questionable as it would imply that an EU legislation is extended to cover taxpayers which are not based in the EU. Furthermore, as far as the intermediaries are concerned, the European Commission has expressly recognized that the Directive only applies to EU intermediaries as it would otherwise be impossible to enforce compliance with the rules or to sanction non-compliance by intermediaries without sufficient presence in the EU. This could lead to situations where, if both the intermediary and the relevant taxpayer are located outside the EU, the intermediary would not have an obligation to report but the management company, as the relevant taxpayer deriving income from EU source would have to report.

Clarifications should be brought in this respect in line also with point 10 of article 8ab providing rules in case there is more than one relevant taxpayers involved in the same arrangement.

We further believe that the territorial scope of the Directive should be clarified (and in particular with respect to sentence c) above), and it should be indicated in which cases a non-EU management company and /or an investment fund could fall within the scope of the Directive.

The Directive does not define "arrangement". Considering that the hallmarks are much too wide and unclear a definition of "arrangement" might help us to get some of the standard tax structures out of scope that have been granted by a European country intentionally.

6. Definition of "arrangement"

The concept of a notification obligation is based on "reportable cross-border arrangements". The criteria "reportable" and "cross-border" are defined in Article 1 (i) b) No. 18 and 19 of the Directive, whereas a definition of "arrangement" is missing.

According to our understanding, the term "arrangement" nevertheless has its own material meaning. As a consequence, only the fact that certain hallmarks and certain tax effects are fulfilled and that there is a cross-border situation, should not automatically lead to a notification obligation. The term "arrangement" should at least require an intentional combination of at least 2 independent circumstances in a way that the tax treatment of the combination is differing from the tax treatment based on a single legislative consideration.

Therefore, it should be clarified that, for example, products like funds which fulfil certain local tax rules in order to be subject to a special tax regime (e.g. the French PEA-status, the Italian IRRP status, the German status of "equity-fund" in the meaning of the German Investment Tax Act, funds that publish Austrian tax figures) are not subject to any notification obligation only because they are fulfilling these tax rules and are subject to a special tax regime. In other words, there has to be another circumstance combined with such products that may create an "arrangement".

Appendix I – Letter with EFAMA comments on Council Directive (EU) 2018/822 of 25 May 2018 amending "Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements" ("DAC 6") and the associated concerns with respect to the adoption by Member States

European Fund and Asset Management Association

EFAMA COMMENTS on
Council Directive (EU) 2018/822 of 25 May 2018 amending "Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements" ("DAC 6") and the associated concerns with respect to the adoption by Member States

I. INTRODUCTION AND BACKGROUND

EFAMA[1] is a strong supporter of the Commission's agenda to enhance tax transparency within the EU with the aim to tackle tax abuse and resulting distortions in the internal market. European investment funds are subject to stringent EU and local regulations covering governance, organisational and operational arrangements, investment guidelines, transparency and investor protection.

EFAMA therefore appreciated the publication of "Council Directive (EU) 2018/822 of 25 May 2018 amending "Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements" ("DAC 6") in the Official Journal of the European Union on 05 June 2018 and would like to make positive use of the opportunity to comment on this Directive. In addition, we would like to set out the views of the European Investment Management industry with regards to the adoption and implementation of DAC 6 by Member States.

We are sending this paper to the tax administrations of all 28 countries adopting the Directive in parallel today; as it is consistency of national implementation that we seek above all considerations. It sets out the views of the European investment management industry with regards to the implementation of DAC 6. Below, we make some general comments before explaining our industry position with respect to some of the hallmarks. This letter outlines some transactions that EFAMA members, as an Industry, consider that should fall out of scope of the hallmarks introduced as Annex IV of DAC6.

[1] EFAMA is the representative association for the European investment management industry. EFAMA represents through its 28 member associations and 62 corporate members more than EUR 25 trillion in assets under management of which EUR 15.6 trillion managed by 60,174 investment funds at end 2017. Close to 32,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining 28,300 funds composed of AIFs (Alternative Investment Funds).

II. GENERAL REMARKS

EFAMA understands that the scope of DAC 6 has been set broadly so as to ensure that all aggressive tax planning arrangements are reported and to prevent loopholes in the framework. Given the potential scope of the directive, it is important that taxpayers and also tax authorities have a degree of certainty about the transactions that need to be disclosed. From a taxpayer perspective, this ensures that any reporting is proportional and doses not give rise to excessive cost. From a tax authority perspective, it ensures that any information provided is relevant and targeted, allowing tax authorities to deploy resources appropriately to dealing with areas of real risk.

EFAMA supports the primary goal of achieving increased tax transparency and fair taxation within the internal market while designing rules that will not create an undue burden on the industry. The OECD BEPS Action 12 final report "Mandatory Disclosures Rules" of 2015 (hereafter "the OECD BEPS Action 12 report"), which contains recommendations regarding the design of mandatory disclosure rules for tax planning schemes and that has inspired the Directive, expressly mentions that *"mandatory disclosure regimes should be clear and easy to understand, should balance additional compliance costs to taxpayers with the benefits obtained by the tax administration, should be effective in achieving their objectives, should accurately identify the schemes to be disclosed, should be flexible and dynamic enough to allow the tax administration to adjust the system to respond to new risks (or carve-out obsolete risks), and should ensure that information collected is used effectively".*

The industry is concerned that the current broad wording of the Directive and the lack of detailed definitions of the various concepts and reporting obligations will not allow to achieve this objective and will not provide market players and taxpayers with sufficient legal certainty as to what is required by the regime. Yet, as further mentioned in the BEPS Action 12 report, *"lack of clarity and certainty can lead to inadvertent failure to disclose (and the imposition of penalties), which may increase resistance to such rules from taxpayers. Additionally, a lack of clarity could result in a tax administration receiving poor quality or irrelevant information".*

EFAMA urges Member States not to exacerbate this situation of legal uncertainty by broadening the scope even more. We would kindly ask Member States to adhere to the following limitations of DAC 6 when implementing the rules into their national law:

1.) The transposition of DAC 6 should be limited to cross-border situations, and not be extended to domestic situations.
2.) The Directive for Administrative cooperation in (direct) taxation in the EU ("DAC") encompasses all taxes of any kind with the exception of VAT, customs duties, excise duties and compulsory social contributions. EFAMA would ask Member States to stick to this specification (direct taxation) in line with the impact assessment prepared by the European Commission and accompanying the Directive.

3.) For the sake of consistency and to avoid additional confusion, all Member States should implement the same deadline for the first reporting. Intermediaries and relevant taxpayers, as appropriate, shall file information on reportable cross-border arrangements by 31 August 2020.

Since DAC 6 targets cross-border arrangements, EFAMA would like to emphasise that it should be implemented as consistently as possible among Member States. An inconsistent implementation of DAC 6 in the affected countries of a cross-border arrangement will lead to confusion and additional uncertainty.

DAC 6 states that **"***in order to minimise costs and administrative burdens both for tax administrations and intermediaries and to ensure the effectiveness of this Directive in deterring aggressive tax-planning practices,* ***the scope of automatic exchange of information in relation to reportable cross-border arrangements within the Union should be consistent with international developments****. […] In implementing the parts of this Directive addressing CRS avoidance arrangements and arrangements involving legal persons or legal arrangements or any other similar structures,* ***Member States could use the work of the OECD****, and more specifically its Model* ***Mandatory Disclosure Rules*** *for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures and its Commentary, as a source of illustration or interpretation, in order to ensure consistency of application across Member States, […].*

EFAMA welcomes the recommendation above. The Mandatory Disclosure rules ("MDR") include a very comprehensive commentary which makes them less subjective and easier to apply than the DAC 6 framework. In the MDR (incl. commentary), the OECD developed some clear definitions and clarifications (e.g. a general exemption in relation to routine banking transactions) which provide for more legal certainty. **EFAMA urges that the recommendation to use the MDR as a source of illustration or interpretation to be implemented into national law.** EFAMA would even go one step further.

To ensure consistency within the whole DAC 6 framework, Member States could use the clarifications, definitions and exemptions of the MDR as a source of illustration and interpretation, not only for those parts of the Directive addressing CRS avoidance arrangements, but for the whole Directive.

Investment funds, management companies and professionals of the financial sector are subject to the Know Your Customer rule (the "KYC rule") and the EU Anti-Money Laundering Directive[2] (the "AML Directive") and are gathering information to fulfil their respective duties under such specific rules. Such collection of information, as well as the analysis and assessment of their clients' files are performed on a risk based approach i.e. based, in particular, on the type of customer, the nature of the relationship, the types of transactions carried out, the distribution channels and the geographical locations involved.

[2] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering

Care needs to be taken in the implementation of the directive at a national level to avoid multiple reporting (or even over-reporting) that would trigger unnecessary compliance costs for investment fund structures. Tax authorities will receive a "tsunami" of information and there is a big risk that the most import information will drown. Also import to say that a broad implementation will cause over-reporting and because of that a big risk for the industry to break the GDPR-rules.

Furthermore, Members States should be aligned and confirm that in any case, no additional due diligence requirements than the ones performed under KYC rule and AML Directive will be imposed on a service provider when assessing if an arrangement has to be reported. In a situation where reporting is due by several intermediaries, they may be relieved from their obligation if, in accordance with national law, the reporting obligation has already been fulfilled by another intermediary.

The Directive indicates that the proof of reporting should be provided according to the national law. It would be useful if Member States could encourage a harmonised approach in the EU that would avoid major differences between national legislations as regards the manner of proving that reporting has already been performed.

III. EFAMA CONCERNS WITH RESPECT TO SOME OF THE DAC 6 HALLMARKS

1.) Main Benefit Test

"That test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage."

EFAMA is of the opinion that, when implementing the directive, Member States should do not lose sight its purpose: to provide Member States 'tax authorities with comprehensive and relevant information about potentially aggressive tax arrangements to enable those authorities to react against harmful tax practices and to close loopholes (according to Recital (2) of the Directive, DAC 6). In implementing the directive, EFAMA would ask Member States to focus on the actual purpose, which means on tax advantages that emerge from aggressive and harmful tax planning.

The Directive introduces a list of hallmarks through a new Annex IV to Directive 2011/16/EU. These hallmarks serve as the key element defining whether a cross-border arrangement qualifies as reportable cross-border arrangement. We have analysed the hallmarks and are of the opinion that several hallmarks would need to be clarified as to their interpretation and application in the context of the investment fund industry.

The main question is related to the interpretation that should be given to the concept of *"tax advantage"* as *"the main benefit or one of the main benefits"* of an arrangement. This question is twofold. Transactions involving a tax exempt investment fund, or a fund subject to a specific low tax rate in the Corporate Tax such as 1%, or a fund subject to subscription tax, should not per se be deemed as reportable for DAC 6 purposes. Arrangements designed to fit the commercial, technical and financial aspects which allows for some tax savings, should not per se be considered as purely tax driven because a tax advantage was obtained.

Where an arrangement is simply taking advantage of a relief or exemption prescribed by the law of the country in which the taxpayer resides in the manner intended then such an outcome would/should not be regarded as the main benefit of an arrangement. The benefit does not derive from the arrangement. It derives from the relevant government policy. More generally, it should be recognised that the over-riding objective for any investor is to derive an investment return from their capital.

In this vein, it would be extremely important for market players to be able to subject arrangements to an objective test where all the benefits, tax and non-tax, would be measured and compared and an overall conclusion on the main benefit of an arrangement could be drawn. In other words, it is important to ensure that the existence of commercial reasons is duly considered and balanced with any tax savings achieved by the arrangement.

2.) Hallmark A.2 + Main Benefit Test

"An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to: (a) the amount of the tax advantage derived from the arrangement; or (b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved."

EFAMA believes further public clarification of the intention of hallmark A.2. is needed. We understand that this hallmark has been designed to capture those schemes that have been sold on the basis of the tax benefits that accrue under them and covers the situation where a taxpayer has the right to a full or partial refund of fees if the intended consequences are not obtained.[3]

This would be in line with the explanations of the European Commission Services, dated 21 September 2017, which clarify that this hallmark refers to arrangements where the tax adviser is entitled to a fee contingent on either the amount of tax advantage derived from the arrangement or on the advantage obtained.

We note that it is common for the pricing of many standard, high volume, financial contracts and instruments to reflect *inter alia* the post-tax position of the issuer or counterparty. Usually, tax will not

[3] BEPS Action 12: 2015 Final Report "Premium or Contingent Fee"

be a 'main benefit' at all. But even where tax is a 'main benefit' to one party that will not normally be apparent to the other parties.

Therefore, EFAMA is of the opinion that Member States should confirm that this hallmark involves the conscious promotion of aggressive tax planning arrangements in order to receive a fee. Neither the intermediary nor the taxpayer should be obliged to inquire into the fees of financial transactions or other services where these are on standard terms or where non-standard terms are not obviously to allow the achievement of an unintended tax benefit.

3.) Hallmark A.3 + Main Benefit Test

"An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation."

EFAMA is of the opinion that Hallmark A.3 should be interpreted with caution. The documentation of financial products sold to retail clients is usually standardised. If these retail products are sold to non-residents, this could qualify as a cross-border arrangement. European tax regimes may afford taxpayers a tax advantage in these circumstances (eg tax deferral), similar to the advantages available for purely domestic arrangements. EFAMA believe Hallmark A.3 should focus on aggressive tax-planning arrangements that have substantially standardised documentation and/ or are available to more than one relevant taxpayer. Hallmark A.3 should not capture financial transactions or services that are widely available in the market. Similarly, arrangements which lead to tax advantages (e.g. tax exemptions or reliefs) that are clearly foreseen by and/or provided for by the law should not be in scope of this hallmark.

If the directive is not applied in an appropriate manner, the actual reporting of all these arrangements would lead to mass-reporting and to a significant administrative burden for intermediaries, taxpayers and tax authorities, which is clearly both disproportionate and also undermines the ability of tax authorities to address tax avoidance. **In the following, EFAMA would like to give you some examples for arrangements with standardised documentation that we believe should not be seen as reportable under Hallmark A.3.**

a.) Sub-funds / share classes limited to certain investors to get easier access to a certain tax treatment.

Investment funds can have different share classes. Some of these share classes might only be open to certain investors e.g. investors from a certain country or tax-exempt investors. However, the achieved tax advantage is not a tax advantage in the sense of an aggressive tax planning scheme. These share classes are created to facilitate administrative processes and to help investors to obtain the tax position that governments intend them to have.

Due to complicated withholding tax refund procedures indirect investments via investment funds are often disadvantaged compared to direct investments. Some source countries require investment funds to provide detailed information about their investor base in order to get access to treaty benefits. However, widely held cross-border investment funds are widely distributed and held by or through distributors which makes it almost impossible for most widely held investment funds to fulfil these requirements. In case the investment fund is not able to claim benefits, the individual investor needs to start the whole process. Given the thousands of investors in a widely held investment fund, this is less likely to happen. Especially in case of UCITS, the reclaim amount for the individual investor is often too small to compensate for the very high administrative burden connected with this procedure. As a result the investor will lose money.

Share classes that are only open to investors from a certain country can sometimes provide a way out of this dilemma. Under certain conditions, some countries such as Switzerland accept sales restrictions as a means to disclose the quote of eligible residents in order to get access to treaty benefits. Another example for restricted share classes can be found in the German Investment Tax Act. Investment funds / share classes are tax exempt if they are restricted to privileged tax exempt investors (e.g. charitable organisations) that can also be non-residents.

b.) Use of Pension Products

Pension Products have substantially standardised documentation and offer tax advantages in most European countries. It is not unlikely that these so called tax incentives are seen as one of the main benefits. Since DAC 6 does not provide for any exclusion for advantages intended to be available under the relevant local tax regime these products might be seen as reportable if they involve cross-border investments. EFAMA is of the opinion that the use of pension products should not be considered as reportable under DAC 6.

The main reason investors buy funds/invest in pension products is to generate investment returns, provide for their retirement. Tax regimes may facilitate that process by ensuring a neutral outcome or encouraging saving but where that is the case the benefit derives from government policy rather than the arrangement per se.

c.) Use of collective investment vehicles

Investment funds pool investors' money. In the case of cross-border investment funds, these investors are residents from multiple jurisdictions. This "pooling" characteristic is crucial in particular to smaller investors and investors from countries without developed financial markets. The economies of scale from investments held through investment funds give access to markets, appropriately diversified, in which investors would otherwise not be able to invest. In many jurisdictions, accumulating funds provide for a tax deferral on capital gains which is in principle a tax advantage.

However, in EFAMA's opinion a reporting on every subscription by every foreign investor would not provide tax authorities with any useful information. Whilst it is atypical that such tax deferral would be

a significant motivator for choosing to invest this way, it would rarely be possible for the operator of the CIV to detect the exceptional cases where the end investor was so motivated.
In light of this lack of obvious public benefit to reporting, and the unlikelihood that the operator of the fund will know much about the motivation of the end investor, we anticipate that fund operators will regard themselves as not being the relevant intermediary in this context. We would suggest that if there are any specific cases in which the national tax authorities would want to see reporting, that those cases and reasoning behind them be set out in guidance.

d.) Non EU-investors choosing UCITS over non-EU investment vehicles
EFAMA would like to emphasise that non-EU investors should have the possibility to invest in UCITS without being in scope of Hallmark A.3. For example, if an investor from the US decides, that he would like to invest in a UCITS instead of a RIC (Regulated investment Company) this investment should not be reportable under DAC 6, even if the higher tax efficiency was part of his decision.

Based on the explanations and examples above, EFAMA would urge Member States to be more precise with respect to Hallmark A. 3 and to clarify that routine transactions in relation to collective investment vehicles should not be in scope. The same should apply for well-known investment fund based financial products.

Again, there is a lack of obvious public benefit to reporting, and little likelihood that the operator of the fund will know much about the motivation of the end investor. So similarly we would suggest that if there are any specific cases in which the national tax authorities would want to see reporting, that those cases and reasoning behind them be set out in guidance.

4.) Hallmark B.2 + Main Benefit Test
"An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax."

EFAMA believes further public clarification of the intention of hallmark B.2. is needed. In our opinion, routine transactions and arrangements that involve collective investment vehicles should be excluded from the scope of this Hallmark to avoid unnecessary administrative burdens and to provide for more legal certainty.

In the following, EFAMA would like to give you some examples for arrangements that should not be seen as reportable under Hallmark B.2.

a.) Use of accumulating investment funds
As described under Hallmark A.3, in many jurisdictions, accumulating funds provide for a tax deferral on capital gains which has the economic effect of rolling up income into what may – in a few jurisdiction - potentially become a capital receipt. If investors invest cross-border in accumulating funds they might see this tax deferral as one of the main benefits. However, we would firstly point out that many EU

member states have regimes that aim to keep the choice between accumulating and distributing funds tax neutral. More significantly, we note that accumulation funds are a better fit for the practical savings needs of many if not most investors. For example, an investor of working age saving for retirement would almost always want income to be added to his or her investment – to save the inconvenience and transaction costs of reinvesting it themselves.

We would therefore think it both entirely reasonable and compatible with public policy objectives for the operator of the fund to assume (save in the rare case of direct evidence to the contrary) that tax deferral was not a main benefit of choosing an accumulation fund.

b.) Partial exemptions

EFAMA would like to emphasise again that tax advantages that are foreseen by the law and that are only a result of the application of tax laws should not be reportable under DAC 6 even if they have the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.

For example, according to the German Investment Tax Act, German or foreign equity funds are investment funds that invest at least 51% of their value in equity participations. Equity funds are subject to tax on German dividend income as well as on withholding tax on foreign dividends, and therefore German investors are subject to flat rate tax exemptions for compensation purposes. For example individuals holding their investment fund shares as part of their non –business assets this exemptions amounts to 30% of the investment fund proceeds (e.g. distributions),even if an investment fund invests 52% of its value in equity and 48% in bonds. It could be argued that the income from the bond investments is "converted into another category of revenue which is taxed at a lower level". However, this is a "tax advantage" which follows from the taxation system and which clearly is foreseen by the German legislator.

Again, we think that in the majority of cases investors will simply choose products that meet their savings needs, and that tax should not be presumed to be a 'main benefit' of their choice.

5.) Hallmarks under D. - Specific hallmarks concerning automatic exchange of information and beneficial ownership

As stated under "II. General Remarks", EFAMA would be grateful for a confirmation that the clarifications, definitions and exemptions of the OECD Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures and its Commentary can be used as a source of illustration or interpretation, not only for those parts of the Directive addressing CRS avoidance arrangements, but for the whole Directive (e.g. the general exemption in relation to routine banking transactions, the scope of an intermediary).

IV. CONCLUSIONS

A big part of the investment fund industry is highly standardised with a large amount of routine transactions. **EFAMA would therefore appreciate any further guidance that clarifies that the routine transactions in and by investment vehicles (e.g. UCITS) are not supposed to be reportable under DAC 6.** In addition, it should be clarified that tax advantages that are foreseen by the law and that are only a result of the application of tax laws should not be reportable.

We are grateful in advance for your attention to the concerns expressed in this letter and we welcome the opportunity to discuss these with you.
In case there is any additional information that we can provide, please contact António Frade Correia (Senior Tax Advisor) at Antonio.FradeCorreia@efama.org or Tel. +32 (0) 2513 3969.

Kind regards,

Tanguy van de Werve
Director General

Brussels, 19 December 2018